Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No

THE SUPERIOR OIL COMPANY,

Petitioner,

v.

THE UNITED GAS IMPROVEMENT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERRATUM

Page 2 line 7 change "October 31, 1959" to "October 31, 1960."

Respectfully submitted,

H. W. VARNER

Attorney for The Superior Oil Company, Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Superior Oil Company (Superior), Intervener in the proceeding below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the below mentioned proceedings on October 31, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, entered October 31, 1960, is reported at 283 F. 2d 817. The opinion and the Court's Judgment entered the same day are reprinted herein as Appendix A (*infra*, pp. 1a-17a). The Order of the Federal Power Commission (Commission), issued August 10, 1959 (App. 147),[1] is reported at

[1] References are to page numbers in the Joint Appendix.

22 F.P.C. 252, and the Order Denying Rehearing, issued October 7, 1959, (App. 179), is reported at 22 F.P.C. 653. These Orders were reversed by the Court below. They are reprinted herein for convenience as Appendix B *(infra* pp. 18a-27a).

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Ninth Circuit were entered on October 31, 1959. Petition For Rehearing was denied on December 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938); 15 U.S.C. Sec. 717r(b).

QUESTIONS PRESENTED

1. Does *The Atlantic Refining Company* v. *Public Service Commission*,[2] commonly termed "CATCO" require that the Commission, in determining whether a proposed producer price is out of line, must reject prices certificated in prior orders which are final by reason of no petition for review or because of judicial affirmation, if such prices are equal to prices certificated in other proceedings which are pending on review?

2. Is the presumption of regularity attributable to a final administrative order overcome by the pending review of an unrelated proceeding between different parties involving the same or similar issues?

3. Did the Court below exceed its authority by substituting its discretion for that of the Commission when it held it to be an abuse of discretion for the Commission to consider producer prices in final certificate orders not subject to review for the purpose of de-

[2] 360 U.S. 378 (1959).

termining the producer price "line" within the meaning of this Court's opinion in the CATCO case?

4. Did the Court below exceed its authority in finding, contrary to the finding of the Commission, that a tax reimbursement in the sum of ¼¢ per MCF is relatively substantial in relation to a total proposed price of 23.8¢?

5. Did the Court below err when it held that the Commission had abused its discretion in failing to consider the instant tax reimbursement provision in ascertaining the price line when the Commission opinion explicitly discusses the matter?

6. Did the Court below properly reverse an order of the Federal Power Commission on a ground of error not raised by Petition for Rehearing to said Commission?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C. §§ 717-717w, are set forth in Appendix C hereto (*infra*, pp. 28a-31a).

STATEMENT OF THE CASE

The decision of the Court below is a misinterpretation of this Court's opinion in Catco. It also conflicts with decisions of this Court and courts of appeals concerning the conclusiveness of final administrative orders and the presumption of regularity accorded all final court decrees and administrative orders.

The Court below reversed an order of the Federal Power Commission, hereinafter called "Commission" for convenience, which issued to Petitioner and The California Company, another independent producer, Certificates of Public Convenience and Necessity authorizing the sale into inter-

state commerce for resale of a gas supply estimated by the purchaser to amount to 636 Billion cubic feet. The Applications for Certificates of Public Convenience and Necessity were filed in conformity with Section 7(c) of the Natural Gas Act[3] after hearing in which not a single one of the purchasing company's 2,000 customers opposed the issuance of the certificates or suggested a conditioning of the proposed prices. The United Gas Improvement Company (UGI), Petitioner below, and New York Public Service Commission (PSC), an Intervener below, each intervened before the Commission, the first because it claims to purchase gas from a vendee of this Petitioner's purchaser, and the second by reason of its zeal for regulation. Neither presented any evidence at the hearing, which was commenced and concluded prior to the CATCO decision of this Court. The evidence showed that the sales contracts involved do not include Favored Nation clauses and that they will not trigger a general price rise or increase the purchaser's rates. The evidence further showed that the proposed initial base price of 21½¢ per MCF was the same as that provided in "30 or 40 or 50 certificates" previously issued by the Commission[4], and that "basically we are looking at

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[3] 15 U.S.C. 717f(c).

[4] Sales to Southern Natural Gas Company at the base price of 21.5 cents per MCF plus 1.3 cents tax reimbursement, 19 F.P.C. 558, from Diverse, Inc., Berkshire Oil Company, Continental Oil Company, Shell Oil Company, Lyons & Logan, California Company, Aluminum Company of America, Grande Corporation, Sohio Oil Company, Tidewater Oil Company, et al, approved April 18, 1958 (prior to the passage of the additional one cent tax described below). Sales to Trunkline Gas Company, 21 F.P.C. 704 (affirmed *Public Service Commission* v. *Federal Power Commission* (CADC 1960), 284 F. 2d 200) from Pan American Petroleum Corporation (three sales), Union Oil Company of California (three sales), Nicklos Oil & Gas Company, at a price of 22 cents per mcf plus tax reimbursement, approved May 22, 1959.
(Footnote continued next page)

a 21½¢ *comparative price in that area*" plus tax reimbursement (App. 14). The evidence additionally shows that the tax reimbursement provision operation in this instance will net to the producer ¼¢ per MCF more than most of the other sales agreements which have been certificated (App. 27); however, the purchaser deemed the acquisition of this supply of gas extremely desirable and beneficial to its customers (App. 7) because it had already received authority from the Commission to purchase gas from two of the three fields involved (App. 6), and therefore would need to construct a very short extension to its overall system (App. 4) to connect this gas. Over and beyond the 30 or 40 or 50 contracts which the witness deemed to create the 21½¢ per MCF plus tax reimbursement "comparative price in the area" specific contracts of Southern Natural Gas Company were referred to which involved the same base price plus tax reimbursement which amounted to 2.175¢ per MFC. These sales had been certificated by the Commission at the time of hearing and were beyond appeal (App. 34 and 35). No objection was made to any of this evidence nor to the witness' conclusion therefrom that same established a comparative price in the area.

(Continued)

Sales to South Georgia Natural Gas Company, 22 F.P.C. 211, from Hunt Oil Company, H. L. Hunt, Earl G. Bateman, Estate of Lydia B. Hunt, Secure Trust Company, The California Company, Placid Oil Company and Gulf Oil Corporation at prices up to 21.5 cents plus 2.175 cents tax reimbursement or 23.675 cents per MCF. This Opinion at Page 219 states that this 23.675¢ price was less than the prices certificated for seven fields in the area and that the price for the Coffee Bay Field gas must be compared with prices up to 23.94¢ per MCF in the area and at Page 220 cites an intrastate sale from Plaquemines Parish at 24.8¢ per MCF including the tax.

Sales to Southern Natural Gas Company from Bayou Postillion by The California Company at 21.5¢ plus tax. 20 F.P.C. 870.

All of the certificates listed above are final certificates not subject to judicial review. They were included in the "30 or 40 or 50 certificates issued" mentioned in Mr. Barnett's testimony (App. 14).

The Presiding Examiner granted a Certificate of Public Convenience and Necessity without price condition April 16, 1959 (App. 135-144). On exceptions the matter was considered by the Commission which with certain modifications adopted the Presiding Examiner's decision. It is interesting to note the following statements in the Commission order, to-wit:

> "Our conclusion is that the requirements laid down by the Supreme Court in the CATCO opinion have been met in this case. In our view, the evidence substantially establishes that the proposed initial price for the sales of The California Company and Superior to United is in the public interest, and the proposed sales are required by the public convenience and necessity. To us, it is clear that there is no warrant or justification for the attachment of any initial price condition in this case.
>
> "Considering whether the price is out of line under CATCO, the facts support the conclusion that Sun's (sic Superior's) price is not out of line on a comparative basis. Much South Louisiana gas is today being sold at 21.5 cents per MFC plus tax reimbursment. • • • Although the price proposed by The California Company and Superior in this case involves greater tax reimbursement than some other 21.5¢ sales, in our opinion this greater tax reimbursement is justified by the factors present, including the size of these reserves, their accessibility to United's pipe line, and the need of United to offer some additional price incentive in order to secure the volumes of gas in question • • • " (App. 150, 151).

UGI petitioned for rehearing by the Commission on the ground that (1) there was no evidence to support the Commission's conclusion that the prices proposed were "in line" under the CATCO criteria or justified on a comparative

basis; (2) that the proposed prices would increase United Gas' purchase cost and the cost of gas to other purchasers in the area, and have a rate impact on consumers; (3) that the record did not establish public need for the gas; and (4) on the ground that the rate standards of the Act had not been properly considered by the Commission in that there was no evidence to show that the proposed sale was at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest. The Petition For Rehearing was overruled with the following comment by the Commission:

> "We did consider the element of price in relation to the public demand and need for this gas and the maintenance of adequate service, as our order on its face discloses, and find that although we cannot determine the "just and reasonable" rate for that sale under the rate provisions of the Act, the certification of the price proposed is justified to assure the maintenance of adequate service in the public interest" (App. 180).

The Court below reversed the Commission order on the ground that said Commission abused its discretion in the light of this Court's CATCO opinion in that the Commission in determining the appropriate price line considered prices certificated in orders not under review but involving prices at the same level as those in orders which were being reviewed. The Court below also held that the Commission abused its discretion when it did not deem a tax reimbursement provision which operated to produce ¼ of a Cent per MCF more tax reimbursement than most other contracts to (a) be relatively substantial, and (b) to place an otherwise "in line price" beyond the requirements of public convenience and necessity.

Rehearing of the decision of the Court below was sought but was denied by Order of the Court below dated December

7, 1960. Following denial of the Petition For Rehearing on due request therefor, issuance of the mandate was stayed by the Court below.

REASONS FOR GRANTING WRIT

I. In holding that the Commission abused its discretion in interpreting this Court's opinion in CATCO concerning prices which are "out of line", the Court below erroneously interpreted said opinion to preclude, in determining the price "line", consideration of certificated prices in Commission orders which were final because of judicial affirmation or failure of any party to seek judicial review. This false precedent has been followed in four other decisions by three other courts of appeals[5] with the net effect that certificates of public convenience and necessity authorizing sales of natural gas in interstate commerce for resale to the consuming public of more than one trillion 700 billion cubic feet of reserves in the five proceedings have been vacated. The reserves here involved total 636 billion cubic feet. The public interest requires that this Court consider this matter on certiorari to rectify the errors made in interpreting the CATCO opinion and to elaborate and clarify the Court's decision in CATCO. This is imperative for proper administration of the Natural Gas Act by the Commission

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[5] No. 15461, C.A. D.C., *Public Service Com. of State of New York, Petitioner* v. *Federal Power Com., Respondent*, (Texas Gas Exploration Corporation, Intervener), decided Dec. 7, 1960, No. 6280, C.A. 10 Cir., *The United Gas Improvement Co., Petitioner*, v. *Federal Power Com., Respondent*, (Sunray Mid-Continent Oil Co., et al., Interveners), decided Jan. 23, No. 18112, C.A. 5 Cir., *The United Gas Improvement Co., Petitioner*, v. *Federal Power Commission, Respondent*, (Sun Oil Co., Intervener), decided Feb. 22, 1961, No. 18113, C.A. 5 Cir., *The United Gas Improvement Co., Petitioner*, v. *Federal Power Commission, Respondent*, (The Superior Oil Company, et al., Interveners), decided Feb. 22, 1961.

and in order that the parties subject to said Act, and the reviewing courts, may be advised as to the issues properly involved in a proceeding under Section 7 of said Act[6] where (a) the prices proposed are not greater than prices previously certificated in the area and they will not trigger a general price increase nor increase the purchaser's rates by operation of Favored Nation clauses or otherwise, on the one hand, and (b) where the prices proposed are higher than the existing price line on the other hand. Of course, both (a) and (b) are dependent upon removal of the present uncertainty as to matters of proper consideration in ascertaining the "price line."

The magnitude of the gas supply as to which certificates of public convenience and necessity have been vacated, in the light of the established need for such gas, requires that this vital question to certification be determined by this Court, and with the least possible delay.

II. The Court below correctly recognized that the "out-of-line" referred to in CATCO may be properly "referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce" (App. 193). But said Court went further to reverse the Commission on the ground that where a number of certificates are under court or commission review, like prices in the same area *though finally certificated* and not currently under review ought to be regarded as "suspect", and cannot be relied upon by the Commission in determining the "out-of-line" unless proved not subject to the infirmities being tested in the pending reviews (App. 195). This means that although an administrative order is final and no longer subject to review under applicable statutes, the price certificated in that order cannot be considered in determining the line of prices under which gas is moving in interstate commerce

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[6] 15 U.S.C.A. 717f.

if other orders with like prices are under review. The qualification concerning "same infirmities" either means nothing as by virtue of its finality the final order has no infirmities, or it presents an insuperable obstacle as it would require inquiry into the record supporting final judgment A and determination that such record is not subject to the objections made in appeal of Case B (which objections are based on record B) in order to determine the propriety of using the price approved in Case A to fix a price line for use in Case C.

This is contrary to the principle of administrative finality and the presumption of regularity accorded final orders. The great bulk of appeals from administrative orders are based on the contention that the record in the particular case does not support the order as entered. The Court below has now held that notwithstanding final administrative determination that the record in a particular case supports as in the public interest a sale at a particular price and the entire proceeding has been finally disposed of, nevertheless the record in that proceeding can be reconsidered in a completely alien proceeding and examined for its sufficiency to support the original order entered in the light of attacks made in still a third proceeding with another record in which a price at the same level is being questioned. Further, that it can serve as no precedent until this has been done. This holding is in conflict with the holdings of this Court and other Courts of Appeals, that even pending appeal the judgment or order is res judicata. *Butler* v. *Eaton* (1891) 141 U.S. 240, 11 S. Ct. 985; *Deposit Bank* v. *Frankfort* (1903) 199 U.S. 499, 24 S. Ct. 154; *Straus* v. *American Publishers Assoc.* (1912 — C.A. 2nd), 201 Fed. 306; *Roberts* v. *Anderson* (1933 — C.A. 10th), 66 F. 2d 874; *Cohen* v. *Superior Oil Corp.* (1937 — C.A. 3rd), 90 F. 2d 810; *Clouatre* v. *Houston Fire and Casualty Co.* (1956 — C.A. 5th) 229 F. 2nd 596; *George H. Lee Co.* v. *Federal Trade Com.* (1940 — C.A. 8) 113 F. 2d 583.

This certainly conflicts with the holding of this Court in *Hynes* v. *Grimes Packing Co.* (1949), Reed J., 337 U.S. 86, 101:

"An administrative order is presumptively valid".

See also: *Pacific States Box & Basket Co.* v. *White* (1935), 296 U. S. 176, 186; *Thompson* v. *Consolidated Gas Utilities Corp.* (1937), 300 U.S. 55, 69; *Martin* v. *Mott* (1827), 12 Wheaton 19, 32-33.

Moreover, this holding of the Court below is inconsistent with its own view in the same opinion where in holding that a denial of intervention from which appeal has not been taken cannot be further inquired into, said:

> "This is true because if not judicially challenged a Commission order excluding participation by others must be taken as correct" (App. 196).

How then can Commission orders not judicially challenged be considered "suspect" as to price or any other issue?

As Mr. Justice Black said in *Federal Trade Com.* v. *Morton Salt Co.* (1948), 334 U.S. 37, 54, where the Court of Appeals had set aside an order of the Trade Commission:

> "The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval * * * * * is to adjudicate questions concerning the Order's violation, not questions of fact which support that valid order."

There are two logical effects of the holding of the Court of Appeals. First, that the ubiquitous interveners in certificate proceedings can select the prices to be used in "referencing" the line to be observed under CATCO by the mere seeking of review in which they attack the proposed price. This emasculates the power of decision conferred

upon the Commission by Act of Congress,[7] and places decision in the complete control of one, or more, intervenors. The second result is even more serious. It is that no price in South Louisiana can be considered in determining an applicable price line until after CATCO and Seaboard (*Public Service Com. v. Federal Power Com.* [1959] 361 U.S. 195) are finally disposed of and therefore the Commission must for all practical purposes cease the handling of certificate proceedings pending such disposition. Bearing in mind that the contracts in CATCO were executed in August of 1956 and the applications filed in September of that year, but still final certificates have not been issued, it can be reasonably anticipated that another two years will elapse before finality is reached! Thus the "inordinate delay" noted by this Court in CATCO in the processing of rate cases is now being forced on the Commission in certificate cases. Such inordinate delay will continue unless and until this Court clarifies the meaning and "tenor" of its CATCO decision.

III. The Court of Appeals invaded the province of the Commission in substituting its discretion for that of the Commission. The Court below held that the Commission abused its discretion in failing to condition the proposed producer prices.

This Court said in its CATCO opinion that a proposed price would not be in keeping with the public interest if it is out of line, or if its approval might result in triggering of general price rises or an increase in applicant's existing rates by favored nation clauses or otherwise, and in such case the Commission might attach such conditions as it believes necessary (P. 391). This, of course, was subject to the prior statement that in considering the public convenience and necessity the Commission must evaluate all

[7] The Natural Gas Act, 15 U.S.C. 717, et seq.

factors but must deem price a consideration of prime importance. Here the Commission found and the record established that (1) the price was not out of line, because the base price was the same as many other sales in South Louisiana plus reimbursement here for the tax actually paid (App. 150, 14, 34, 38), (2) there would be no triggering of general price rises because the price was the same as that in many other sales (App. 150, 4), (3) there would be no increase in applicant's existing rates because there were no favored nation clauses in United's contracts and because the slight difference of 2.7 Mills was insignificant (App. 150, 151, 5), (4) that the tax differential was justified as discussed below. The Commission then evaluating these factors and the need of the public for the gas found that this was not a situation which justified a price condition. The Commission based its conclusion on the complex of elements comprising the public convenience and necessity. The Court below rejected the explicit findings of the Commission and substituted its own discretion. This cannot be done consistently with the decisions of this Court. *Gray* v. *Powell* (1941), 314 U.S. 402, 412; *United States* v. *Louisville & Nashville RR Co.* (1914), 235 U.S. 314, 320; *Swayne & Hoyt* v. *United States* (1937), 300 U.S. 297, 304; and *Securities and Exchange Com.* v. *Chenery Corp.* (1947), 332 U.S. 194, 207. In the *Gray* case at Page 412, Mr. Justice Reed said:

> "Where as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. • • • Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director."

In the *Chenery* case, this Court said (207):

> "The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks *any* rational and statutory foundation." (Emphasis added.)

IV. The Court below erred in reversing the Commission Order on the ground that its failure to consider the price differential resulting from operation of the tax reimbursement clause in this case was an abuse of discretion. The Court said:

> "It follows from this, we believe, that comparative tax reimbursement plans as well as comparative base rates ought to be taken into consideration in determining whether a proposed initial price is out of line. Except where the difference in tax reimbursement features is relatively insubstantial, it is our opinion that failure to take account of such a difference would be an abuse of discretion" (App. 197).

It has long been the practice of the Commission to allow rate changes for changes in taxes paid under contracts which provide for reimbursement for "additional" taxes. Taxes in addition to those existing at the time of contracting are deemed "additional taxes" and the effect of such clauses is relatively standard.

> "In most of the contracts we reimburse about 2 cents or 2.3, and, then, as to additional taxes, over and above 2.3 we reimburse 75 per cent of them." Witness Barnett (App. p. 27).

The amount of the reimbursement depends on the tax situation at the time of contacting and subsequent tax changes.

Superior's contract was dated September 8, 1958. During the period of negotiations, on June 16, 1958, the Governor of Louisiana signed a bill, effective August 1, 1958, adding one cent to the State tax for a total of 2.3 cents

per Mcf.[8] This was the "existing" tax assumed by the purchaser here. Had the bill not become a law during the negotiations, only 75% of the new or additional one cent would have been assumed by the purchaser. The agreement to reimburse this one cent made the gross price here ¼ cent higher than the gross price in the older contracts under the terms of which the cent was a "new or additional" tax of which only 75% was to be reimbursed (App. 14, 24, 26).

The Commission found this reimbursement provision not to be out of line nor substantial (App. 150). Certainly the very language of the Commission order refutes the claim that it failed to consider the effect of the tax reimbursement clause. It said:

> "Although the price proposed by the California Company and Superior in this case involves greater tax reimbursement than some other 21.5-cent sales, in our opinion this greater tax reimbursement is justified by the factors present, including the size of these reserves, their accessibility to United's pipeline, and the need of United to offer some additional incentive in order to secure the volumes of gas in question (App. 150).

Moreover even if the Court below was correct in holding that the tax reimbursement should be considered a part of the price for the gas it had no right to overturn the Commission determination that the matter was non consequential since the Commission had expressly taken account of the differences in relative tax reimbursement provisions. Thus the Court below was in error either because the reimbursement for the new one cent tax was justified or because the Commission did compare it with the reimbursement provisions of other sales in the area and found the one-quarter cent difference to be not "substantial".

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[8] Act 8, 1958, House Bill 303, Amending Title 47, Louisiana Revised Statutes 1950, approved June 16, 1958.

V. The Court of Appeals based its reversal of the Commission Order on two points not raised before the Commission: (1) where a substantial number of certificated prices are under review by court or Commission, like prices in other contracts in the same area must be regarded as suspect except upon evidence and findings that they are not subject to the same infirmities which are being tested in the pending proceedings; and (2) unless the difference in tax reimbursement provisions is relatively insubstantial, the failure to take such difference into account is an abuse of discretion.

A careful reading of the Petition for Rehearing filed by UGI (App. 159) reveals that neither of these points was raised before the Commission as required by Section 19(b) of the Act 52 Stat. 831 (1938); 15 U.S.C. § 717r(b)). Points not submitted to the Commission on Application for Rehearing cannot be considered by the Court of Appeals, either when raised by a brief of one of the parties or sua sponte.

The Courts have rigorously applied the limitation of Section 19(b) of the Act in this respect. This Court held in *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission* (1945) 324 U.S. 635, 649-651, that the failure of the appellant to raise the point of the lack of Commission authority to include producing properties in its rate base in its petition for rehearing precluded the consideration of that point by the reviewing court. This Court again applied the limitation of Section 19(b) to reverse the Court of Appeals which considered an objection sua sponte which had not been raised by petition for rehearing in *Federal Power Commission* v. *Colorado Interstate Gas Company* (1955) 348 U.S. 492, 498-499:

> "Section 19(b) then expressly precludes the consideration by the court of any objection to an order of the Commission unless the objection shall have been urged before the Commission in the application for rehearing. As the court is thus expressly precluded from considering an objection, when, without prior application to the Commission, that objection is presented to the court by the party directly aggrieved, it cannot be assumed that Congress intended to permit the same court to consider the same objection under the same circumstances, sua sponte, merely because the objection was not presented to the court by the party aggrieved."

See also *City of Pittsburgh* v. *Federal Power Commission* (CADC 1956) 237 F. 2d 741, 749; *Magnolia Petroleum Company* v. *Federal Power Commission* (CA 5 1956) 236 F. 2d 785, 789; *Memphis Light, Gas and Water Division* v. *Federal Power Commission* (CADC 1957) 243 F. 2d 628, 632; and *American Power and Light Company* v. *Securities and Exchange Commission* (CA-1 1944) 141 F. 2d 606, 613, aff'd. 329 U.S. 90.

The Court of Appeals clearly exceeded its review authority under the statute in reversing the Commission order on these grounds, and it ruled contrary to the above prior decisions of this Court and other Courts.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that this petition for a writ of certiorari be granted.

F. P. Jones, Jr.
R. B. Voight
H. W. Varner
P. O. Box 1521
Houston 1, Texas
Attorneys for Petitioner.

March 1961

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 16,692
Oct. 31, 1960

On Petition to Review Order of the Federal Power Commission

Before: BARNES and HAMLEY, Circuit Judges, and FOLEY, District Judge

HAMLEY, Circuit Judge:

Under review in this proceeding is a Federal Power Commission order granting certificates of public convenience and necessity enabling two producers of natural gas to sell their product to a natural gas pipeline company. The two producers are The Superior Oil Company (Superior) and The California Company (California), both of which are lessees of natural gas fields in Louisiana. The gas is to be sold to United Gas Pipe Line Company (United) which is engaged in purchasing natural gas and thereafter transporting and selling it in interstate commerce.

The petition to review was filed by The United Gas Improvement Company (UGI), operator of the municipally-

owned gas works of the City of Philadelphia. United, Superior, California, and the Public Service Commission of the State of New York (New York) have intervened in this court. The City of Philadelphia has filed an amicus curiae brief.

On July 21, 1958, California and United entered into a contract for the sale and purchase of natural gas produced under a lease held by California in the Bayou Penchant Field, Terrebonne Parish, Louisiana. On September 8, 1958, Superior entered into a similar contract with United relating to natural gas produced from certain leaseholds and interests in leaseholds held by Superior in the Bayou Penchant, Palmetto Bayou, and Four Isle Dome Fields, Terrebonne Parish, Louisiana. These gas purchase contracts considered together, are for the sale during a term of twenty years of an estimated total of 636 billion cubic feet of reserves. Each contract provides for an initial "base" price of 21.5 cents per Mcf plus 2.3 cents per Mcf tax reimbursement, or a total initial price of 23.8 cents per Mcf.[1]

By virtue of section 7(c) of the Natural Gas Act (Act), 15 U.S.C.A. §717F(c), it was necessary for Superior and California to obtain from the Commission certificates of public convenience and necessity authorizing them to sell this gas to United. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672. Both companies applied for such certificates. It was

[1] In each contract the initial base price is to govern until March 1, 1963. The base price is then to be 23.5 cents per Mcf for the next four years, 25.5 cents for the next succeeding four-year period, 27.5 cents for the third four-year period, and 29.5 cents during the remaining period of the contract. The price specified for any of these subsequent periods is subject to redetermination according to a formula and procedures set out in the contracts. It is also provided that in the event taxes are imposed in excess of the rate of 2.3 cents per Mcf, United will reimbuse Superior and California for three fourths of the amount of such tax increase.

also necessary that United obtain such a certificate authorizing it to construct and operate certain lateral supply facilities required for receiving the gas to be purchased under these contracts.

The three applications were consolidated for hearing and disposition by the Commission. The hearing was held and concluded on March 17, 1959, before a Commission hearing examiner. UGI and New York were intervenors in that proceeding. On April 16, 1959, the examiner issued his findings and conclusion along with his decision and order that the certificates be issued as applied for with no conditions attached. 22 F.P.C. 252, 256.

Exceptions to the examiner's decision were filed by UGI. These exceptions were considered and in substance denied by the Commission in a decision and order dated August 10, 1959, and it was ordered that the certificates be issued. 22 F.P.C. 252. UGI and New York filed separate petitions for rehearing. These petitions were denied by the Commission on October 7, 1959. This review proceeding was then instituted.

The quarrel which UGI and New York have with the Commission order is that it has the effect of establishing higher initial producer prices than they believe are warranted.

It is provided in section 7(e) of the Act that a certificate of the kind here in question shall be issued if among other things the proposed sale or construction "is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." Under this provision the Commission is vested with control over the conditions under which gas may be initially dedicated to interstate use.

Among the conditions thus subject to control are those which relate to the initial price proposed to be charged and

paid. This does not mean that before certificating such a sale the Commission must determine that the proposed initial price is just and reasonable. It does mean that there should be by the Commission "a most careful scrutiny and responsible reaction to initial price proposals of producers under §7." *Atlantic Refining Co.* v. *Public Service Commission (Catco)*, 360 U.S. 378, 391.

The court in Catco stated the circumstances under which a "responsible reaction" to an initial price proposal would preclude the granting of a permanent and unconditional certificate. ". . . Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest," the court said, "a permanent certificate should not be issued." 360 U.S. at 391. Such a situation would exist, the court indicated, where the proposed price is not in keeping with the public interest.

> ". . . because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise." *Id.*

In this event, the court stated, the Commission might in its discretion grant a certificate subject to "such conditions as it believes necessary." 360 U.S. at 391. It follows that ordinarily when the proposed initial price signals the existence of such a situation, a certificate should not be issued or if issued appropriate conditions should be attached.

We say "ordinarily" because in *Texas Gas Transmission Corp.*, 22 F.P.C. 378, review pending, sub nom. *Public Service Commission* v. *F.P.C.*, No. 15461 (CADC), the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued

notwithstanding the fact that the proposed price is out of line. Said the Commission:

> ". . . We shall consider any new application based upon a price in excess of any price we have heretofore certificated to be 'out of line' and shall require conclusive proof from the applicant that the public convenience and necessity requires certification at that price."[2] *Id.* at 388.

In the case before us the certificates were ordered to be issued in permanent form and without price conditions. In the light *of Catco* this was warranted in so far as prices are concerned only if the Commission found on substantial evidence (1) that the proposed initial rates were not "out of line" as the Supreme Court used those words, or that if "out of line" the public convenience and necessity of certifying at those rates had been established, and (2) that their approval would not result in a "triggering" of general price rises or an increase of the applicants' existing rates.

We turn first to the "out of line" factor. In its order of August 10, 1959, the Commission concluded that the proposed initial prices of Superior and California in this proceeding are not out of line.[3] Thus the Commission never

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[2] It is apparently with reference to this principle that the Commission states in its brief:

> "Where a proposed price is 'in line' a certificate issues on a minimal showing; where, however, the price is 'out of line' the applicant must make an extensive demonstration in support of his rate, else he suffers a certificate denial or a price reduction."

[3] What the Commission said was: "Considering whether the price is out of line under *Catco*, the facts support the conclusion that Sun's price is not out of line. . . ." The reference to "Sun's" price is an apparent inadvertence, the intended reference being to Superior's and California's prices. An order involving the same issue, in which Sun Oil Company was the applicant, was entered on the same day. Sun Oil Company, 22 F.P.C. 351.

reached the question of whether prices which were out of line were nevertheless consonant with the public convenience and necessity.

UGI and New York challenge the Commission's ruling on two grounds: (1) the Commission misconceived what the court in *Catco* meant by the "line"; (2) assuming that the Commission properly construed that term, the record does not support the finding that the initial prices here proposed hold the line.

UGI and New York advance several reasons why in their opinion the criteria applied by the Commission evidence a misconception of what the court in *Catco* meant by the "line." One such reason is that the Commission predicated the price line upon comparative prices paid by pipeline companies in the area rather than upon prices paid by the applicant pipeline company.

That this was the principal criterion employed, with some special consideration of tax reimbursement provisions and the competitive situation, is indicated by this statement contained in the Commission order under review:

> "Considering whether the price is out of line under *Catco*, the facts support the conclusion that Sun's price is not out of line on a comparative basis. Much south Louisiana gas is today being sold at 21.5 cents per Mcf plus tax reimbursement. Numerous other pipeline companies compete in this general area, and a number of 21.5-cent contracts have been executed. Although the price proposed by The California Company and Superior in this case involves greater tax reimburse-

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The hearing examiner had made no finding as to whether Superior's or California's proposed prices were out of line. The reason for this is that the decision in *Catco*, which first discussed that consideration, was not handed down until after the hearing examiner had issued his decision.

ment than some other 21.5-cent sales, in our opinion this greater tax reimbursement is justified by the factors present, including the size of these reserves, their accessibility to United's Pipeline, and the need of United to offer some additional price incentive in order to secure the volumes of gas in question.

"The facts disclose that there were several prospective purchasers for this gas in addition to United, and that several offers were made to both The California Company and Superior for this gas. At least one such offer was at the same price United offered, but The California Company accepted United's offer, primarily because it preferred the 'take' provisions of United's contract. Superior preferred the United offer because there would be less delay in making deliveries." 22 F.P.C. 252, 254-55.

In *Catco* the proposals concerned a portion of the outer continental shelf where the applicant pipeline company, Tennessee Gas Transmission Company (Tennessee), had no other contracts. Likewise, except for some contracts involving smaller reserves and smaller future potentials, no other pipeline company held any contracts in that area. In the absence of any comparative prices in the outer continental shelf area[4] the court in *Catco* took notice of prices paid by Tennessee in another offshore area, the weighted average cost of gas to Tennessee in all areas, and prices paid by Tennessee in southern Louisiana. These other prices were substantially below the proposed initial rate in *Catco*, and the court found nothing in the record to justify the increase. It was therefore held that there was insufficient evidence to

[4] In our view the reference in *Catco* to the applicant pipeline company's other prices does not imply a ruling that under other circumstances prices paid by other pipeline companies in the same area may not be used for comparative purposes in setting a price line.

support a finding of public convenience and necessity prerequisite to the issuance of a permanent certificate.

The public has an interest in both obtaining reasonable rates and the expeditious dedication of needed new gas reserves. The first such interest is accentuated when as here producer prices have been advancing from plateau to plateau without regulatory supervision. The second such interest would be adversely affected by the lengthy delays occasioned if disposition of certificate applications must await formal adjudication of proposed initial rates.

The "hold the line" technique spelled out in *Catco* is a stopgap device designed to meet the need created by this combination of circumstances in a manner as simple, direct and effective as possible. Its function is to afford standby protection to the public pending normal rate adjudicatory proceedings while enabling the Commission to act upon certificate applications with reasonable dispatch.

Considered in this light, the "line" referred to in *Catco* may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce. Where some or all of the relevant producer prices are those paid by other pipeline companies it is especially important that they be consulted for comparative purposes. Otherwise an applicant pipeline company would be bound to a line established by its own past prices. In that event it would not be able to contract for new reserves in competition with pipeline companies whose existing prices would warrant a higher line. Where there are no relevant existing producer prices with which a price proposal may be compared, *Catco* indicates the best criterion of a proper price line may be the applicant's prices elsewhere, qualified where necessary by substantial evidence explaining price differentials.

Existing producer prices are relevant for comparative purposes only if they pertain to gas production in the same or an analogous area and if other principal features of the contracts are fairly comparable. Thus the contracts should be comparable from the standpoint of gas reserves and future potentials. The significance of any disparities existing as to these conditions should be explained by Commission findings based upon substantial evidence. Substantial variation in the quality of gas sold should be similarly treated. The Commission followed this course in *Transwestern Pipeline Co., et al.*, 22 F.P.C. 391. Disparate provisions relative to facilities to be provided and other services to be rendered should be given effect as well in determining the propriety of the analogy to rate under other existing contracts.

In our view, however, a determination of relevancy for comparative purposes does not require examination into factors such as relative production costs which are not reflected in specific terms of the contracts. If this were required to implement the "hold the line" technique, the procedure would assume much of the complexity of a rate adjudication. This would tend to defeat the objective of providing simple, direct and effective stopgap protection for the consuming public. Where there are no producer prices which are otherwise comparable and resort must be had to other criteria, however, relative production costs, need, competition between pipeline companies, and no doubt other factors become significant.

From all that is said above it will also be understood that we find without merit the contention that the price line must necessarily accord with the pre-*Cities* line. We agree with the view expressed by the Commission in *Texas Gas Transmission Corporation et al.*, 22 F.P.C. 378, 388, that factors

such as increased production costs since *Catco*, comparative accessibility of field locations, and comparative depth of sands tend to make pre-*Catco* prices irrelevant for comparative purposes in other cases.

UGI and New York further contend, however, that if the prices paid by other pipeline companies may be resorted to for comparative purposes, such comparison must at least be limited to prices which have been authorized only after the Commission's careful scrutiny according to *Catco* standards. It is argued that until it is demonstrated that such other prices have themselves been justified in certificate proceedings or tested in rate proceedings "they are absolutely meaningless as a touchstone."

The Commission points out that in utilizing price comparisons for the purpose of drawing a "line" the Commission has limited itself to a consideration of certificated prices. It nevertheless concedes that these certificated prices for the most part have never been subjected to Commission scrutiny. But, the Commission argues in effect, such a limitation is neither expressed nor implied in the *Catco* decision, and to impose such a limitation would render the whole technique impractical.

As previously indicated, the price line is intended to reflect current conditions in the industry. Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could, in fact, require a rollback to prices having no current relevancy.[5]

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[5] The Commission points out that virtually none of the south Louisiana prices have been scrutinized in rate or certificate proceedings.

Assuming the criteria employed by the Commission to be otherwise acceptable, we hold that the consideration for comparative purposes of producer prices not previously scrutinized does not evidence an abuse of discretion.

A third criticism which is leveled against the criteria employed in fixing a price line is that the Commission sanctions the use for comparative purposes of prices which are under review in pending court and Commission proceedings.

This objection is not raised as an abstract proposition. UGI contends that of the forty-seven producer price schedules upon which the Commission may have relied in fixing the line at 21.5 cents per Mcf (basic rate) in this case[6] four such schedules established in *Trunk Line Gas Company et al.*, 22 F.P.C. 110, were and are under review in the Court of Appeals for the District of Columbia. Another thirty-one of these forty-seven schedules, UGI asserts, are presently under re-examination by the Commission in the Transco-Seaboard certificate case.[7]

When an order certificating an initial rate is under court or Commission review, it is possible that the certificate may be eventually denied or price conditions may be attached.

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[6] The Commission order and the record on which it is based do not reveal what producer price schedules were relied upon in fixing the line at 21.5 cents. In an appendix to the Commission's brief in this court there are listed forty-seven certificated schedules on file with the Commission prior to August 10, 1959, in which an initial price of 21.5 cents or more was specified. It is stated in the appendix that this list "is not exhaustive." It is not represented in the Commission's brief that these are the actual schedules relied upon by the Commission in its order of August 10, 1959.

[7] *Public Service Commission of New York* v. *Federal Power Commission, et al.*, 361 U.S. 197, reversing 3 Cir., 269 F. 2d 865, with directions to remand to the Federal Power Commission "for reconsideration and redetermination in the light of *Atlantic Refining Co.* v. *Public Service Commission of New York (Colco)*, 360 U.S. 378."

In our opinion an existing rate subject to such a hazard does not provide a reasonably reliable basis upon which to predicate a price line. In the event the existing rate is later modified or conditioned as a result of the pending proceedings the foundation of the line derived therefrom would be undertermined. Moreover, the acceptance of questioned existing prices as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged.

For the reasons indicated we are of the opinion that it would be an abuse of discretion for the Commission in establishing a price line to rely upon producer prices which are under such a cloud.

We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings.

It is next contended that the technique used by the Commissioner sanctions the use for comparative purposes of prices scrutinized by the Commission in other proceedings in which a party to the current proceedings was denied the right to participate.

Here again the objection is not abstract, but is directed to circumstances existing in this case. Of the forty-seven producer price schedules referred to in footnote 6, UGI asserts that sixteen schedules were certified in four proceedings in which UGI and New York were denied the right to partici-

pate. Denial of the right to participate was apparently on the ground that UGI and New York were not interested in those proceedings. The proceedings involved producer sales of gas destined for resale in parts of the country where UGI has no facilities and New York has no jurisdiction.[8]

Where such a denial of the right to participate in prior proceedings has not been judicially challenged, the fact of denial should not preclude the Commission from referring to the initial price therein certified in the process of fixing a line in a subsequent proceeding. This is true because if not judically challenged a Commission order excluding participation by others must be taken as correct.

Where, however, denial of the right to intervene in the earlier proceedings is being questioned in the courts the rate schedule certificated in that proceeding ought not to be so utilized. We have heretofore stated the reasons why prices established in an order subject to a pending court review ought not to be considered in fixing a price line.

Another objection advanced against the Commission's manner of proceeding is based on the fact that outstanding contracts deal in a variety of ways with the matter of tax reimbursement. Because of this variety of treatment, it is contended, prices accepted for comparative purposes should include the tax reimbursement feature.

In determining that the initial prices proposed by Superior and California were not out of line the Commis-

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[8] See, for example, *Trunkline Gas Company, et al.*, 22 F.P.C. 110, order issued on July 22, 1959, and opinion of Commissioner Connole dissenting therein. As previously noted, the order entered in this proceeding involving four of the rate schedules which are listed in the appendix to the Commissioner's brief is under review in the Court of Appeals for the District of Columbia.

sion considered only the base price of 21.5 cents per Mcf and did not include the 2.3 cents per Mcf tax-reimbursement feature. Considering only the base rate, the Commission was able to say that it was not out of line with the other basic rate schedules upon which it must have relied. Had it considered the total initial price, including tax reimbursement, however, the Commission could not have made that statement.[9]

The Commission correctly points out that the taxes paid by a producer represent out-of-pocket cost. Hence reimbursement for such taxes does not in and of itself represent gain by the producer. The right of recoupment of a volumetric tax cost is established in Commission practice.

The fact remains, however, as the Commission concedes, that tax reimbursement is an item for bargaining between producer and pipeline company. As a result of such bargaining one pipeline company may agree to a 21.5-cent initial price but only partial reimbursement for taxes. In another contract (the instant case, for example) a pipeline company may obtain the same initial price but in order to do so may have to agree to full reimbursement for taxes at present rates. It is apparent that the second producer has obtained a better price than the first one, for it has been able to pass along all of its volumetric tax costs as a separate item.

It follows from this, we believe, that comparative tax reimbursement plans as well as comparative base rates

[9] This is made clear in the hearing examiner's decision stating:

". . . Each contract provides for an initial 'base' price of 21.5¢ per Mcf plus 2.3¢ per Mcf tax reimbursement, or a total initial price of 23.8¢ per Mcf. This total price is 0.25¢ per Mcf higher than any at which a sale has been certificated by the Commission in South Louisiana. There are other sales which have been certificated at the same 'base' price; but no other involves a contract which calls for this 'base' price plus a tax reimbursement of as much as 2.3¢, which is the total tax at the present time." 22 F.P.C. 252, 257.

ought to be taken into consideration in determining whether a proposed initial price is out of line. Except where the difference in tax reimbursement features is relatively insubstantial, it is our opinion that failure to take account of such a difference would be an abuse of discretion.

Summarizing on this branch of the case, we are of the view that with respect to the use for comparative purposes of prices presently under review and the failure to consider tax reimbursement features in making such comparisons the criteria employed by the Commission in fixing a line by which to test the proposed initial rates of Superior and California fall short of what is required under *Catco* and the Act. Since it was apparently upon the basis of a line so determined that the Commission ordered issuance of a permanent and unconditional (as to prices) certificate, we hold that the Commission abused its discretion in so doing and that the order must be set aside.

In view of the conclusion just stated it is not necessary to deal at length with the other arguments which have been advanced by UGI and New York. Since, however, further proceedings before the Commission will now be required, we briefly state our views on other questions which the Commission must again face.

Concerning the adequacy of the evidence to support the Commission findings, it is to be remembered that this is not a rate proceeding. Hence a comprehensive showing such as would therein be required is not necessary. Nevertheless, where the Commission relies upon existing certificated rates in establishing a line, evidence ought to be submitted concerning those rates. The contracts ought to be identified, and each should be subject to test as to arms-length bargaining, identity or similarity of gas production area, na-

ture of gas reserves, quality of gas, facilities to be provided and services to be performed.

With regard to the factor of triggering of price increases, we find nothing wrong with the Commission finding that United's other contracts will not be substantially affected. They contain no "favored nation" clauses. The testimony as to a noncontractual "favored nation" policy concerning one customer does not seem to us of sufficient importance to undermine the Commission's finding. In any event the petitions for rehearing did not raise this question. Hence, in view of section 19(b) of the Act the point may not be raised here. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649, 651.

The *Cities* decision in discussing "triggering" refers not alone to possible increases in the applicant's rates, but to possible "general price rises." The Commission order appears to contain no finding as to whether the proposed initial prices might result in a triggering of general price rises.

The Commission order is vacated and the matter is remanded to the Commission for further proceedings consistent with this opinion.

(Endorsed) Opinion Filed Oct. 31, 1960.

Frank H. Schmid, Clerk.

DECREE

On Petition to Review an Order of the Federal Power Commission.

This cause came on to be heard on the Transcript of the Record from the Federal Power Commission and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said Federal Power Commission in this cause be, and hereby is vacated, and that this cause be, and hereby is remanded to the Federal Power Commission for further proceedings consistent with the opinion of this Court.

(ENDORSED) Decree
Filed and entered: October 31, 1960
FRANK M. SCHMID, Clerk

APPENDIX B

Order Issuing Certificates of Public Convenience and Necessity and Modifying and Adopting Initial Decision of the Presiding Examiner

(Issued August 10, 1959)

On April 16, 1959, the presiding examiner issued an initial decision in the above-entitled proceedings by which he would grant a certificate of public convenience and necessity under Section 7(e) of the Natural Gas Act to The California Company and The Superior Oil Company (Superior), authorizing these companies to render sales of natural gas to United Gas Pipe Line Company (United). The California Company would produce its gas from the Bayou Penchant Field, Terrebonne Parish, Louisiana. Superior would produce its gas from the Bayou Penchant, Palmetto Bayou and Four Isle Dome Fields, Terrebonne Parish, Louisiana. The initial price for these proposed sales is 21.5 cents, without tax reimbursement. The examiner would also authorize United to construct and operate facilities estimated to cost $1,120,312, to receive deliveries of the gas into its system.

Exceptions to the examiner's decision were filed only by United Gas Improvement Company (UGI), a distributing company which sells gas in Philadelphia and vicinity, and by Superior.

This case is companion to *Matters of Sun Oil Company*, Docket Nos. G-15122, *et al.*, order issued this date. Here as there, UGI requests that final action on the applications in this case be withheld until decision is reached by the Supreme Court in *Atlantic Refining Co.* v. *Public Service*

Commission of the State of New York (the *Catco* case), and by the Court of Appeals for the Third Circuit in *United Gas Improvement Co.* v. *F.P.C.*, taking the position that here as there the facts do not support the initial price proposed by the producers, and that the producer sales proposed herein should be treated in the same manner that the sales in the Court cases are permitted or required to be treated.

Decisions have now been handed down in the *Catco* case, 79 Sup. Ct. 1246, (June 22, 1959), and the *United Gas Improvement Company* case, Nos. 12797 and 12805 (CA 3, August 4, 1959), — F. 2d —.

We conclude, as more fully appears below, that with certain modifications, the presiding examiner's initial decision should be adopted and UGI's exceptions thereto denied.

Our understanding of the requirements of the Supreme Court's *Catco* opinion we stated in our Opinion No. 325 and accompanying order issued August 7, 1959, in *Matters of South Georgia Natural Gas Company*, Docket Nos. G-9892, *et al.* See also our opinions in the *Texas Gas Transmission Corporation* case, G-17335, *et al.*, and the *Transwestern Pipeline Company* case, G-14871, *et al.* Summarizing briefly, under the *Catco* case the producer's proposed initial price must be supported by substantial evidence establishing that the price is required by the public convenience and necessity and is in the public interest; and although the Commission should consider all the factors, price is an element of prime importance, which the Commission should scrutinize closely with a view to protecting

the consumer. The Court further indicated what evidence might or should appropriately be adduced to support the proposed price, and what circumstances justified the attachment of an initial price condition. Such evidence includes evidence of whether the proposed price is "out of line"; whether it would result in triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise; evidence of comparisons with the existing cost of gas to the purchaser; evidence of whether the proposed producer price would lead to an increase in the rates of the purchaser; evidence of a public need for the gas; and evidence respecting the other matters discussed by the Court in its opinion.

In addition, it appears from the Court's opinion that producer certificate proceedings need not necessarily assume the character of rate proceedings under Section 4 or 5 of the Act, the Court stating at 79 Sup. Ct., p. 1255, that "Section 7 procedures in such situations [involving the attachment of price conditions] thus act to hold the line awaiting adjudication of a just and reasonable rate." Finally, it seems clear from the opinion that if a record sustaining the proposed initial price is not made, the certificate must be denied or conditioned, as the facts require, and that therefore it is the applicant which at least runs the risk of failing to substantiate the proposed price.

In applying the *Catco* opinion, the Third Circuit Court of Appeals in the United Gas Improvement Company case cited above, upheld our opinion certificating producer sales without price conditions, concluding that on the facts there before it, the Commission did not err in the balancing of

the weight it accorded the various factors of public convenience and necessity.

Many of the circumstances and considerations applicable in the Sun Oil Company case, Docket Nos. G-15122, *et al.* also apply here, and the controlling considerations need be summarized only briefly. Our conclusion is that the requirements laid down by the Supreme Court in the *Catco* opinion have been met in this case. In our view, the evidence substantially establishes that the proposed initial price for the sales of The California Company and Superior to United is in the public interest, and the proposed sales are required by the public convenience and necessity. To us, it is clear that there is no warrant or justification for the attachment of any initial price condition in this case.

Considering whether the price is out of line under *Catco*, the facts support the conclusion that Sun's price is not out of line on a comparative basis. Much south Louisiana gas is today being sold at 21.5 cents per Mcf plus tax reimbursement. Numerous other pipeline companies compete in this general area, and a number of 21.5-cent contracts have been executed. Although the price proposed by The California Company and Superior in this case involves greater tax reimbursement than some other 21.5-cent sales, in our opinion this greater tax reimbursement is justified by the factors present, including the size of these reserves, their accessibility to United's pipeline, and the need of United to offer some additional price incentive in order to secure the volumes of gas in question.

The facts disclose that there were several prospective purchasers for this gas in addition to United, and that several offers were made to both The California Company

and Superior for this gas. At least one such offer was at the same price United offered, but The California Company accepted United's offer, primarily because it preferred to "take" provisions of United's contract. Superior preferred the United offer because there would be less delay in making deliveries.

As to the possibility of increased rates resulting from triggering referred to in the *Catco* case, none of United's contracts contain any 'favored nation' clauses and one of them can be triggered by the price for these sales.

With respect to the impact of United's cost of gas, the company estimates that it will withdraw approximately 30 billion cubic feet annually from these fields, and that the combined effect of the contracted prices on United's overall cost of gas will be an average increase of two and seven-tenths mills per Mcf. Considering the benefits to United of the acquisition of these reserves, in our judgment this effect does not require denying the sale or attaching a condition.

Among those benefits is the gas supply which would be added to United's system. United estimates that it will acquire through these two contracts 636 billion cubic feet of reserves, a very substantial volume. Moreover, this gas could be added to United's system with very little line construction. Furthermore, United needs this gas to help meet the present and future demands of its customers and the markets it serves. The facts disclose that United delivers to its customers in excess of 1 trillion cubic feet of gas each year, that the demands on United's system increase each year, and that United must continue its policy of

buying gas reserves in order to continue to supply the service it has undertaken to provide. The fact cannot be avoided that the price offered must be sufficient to induce the producer to sign the contract. The facts support the conclusion that United bought this gas on the best terms possible, and that it could not have gotten these desirable reserves at any lower price.

The gas sales contracts involved in this case were consummated only after arm's-length negotiation and there is no affiliation or corporate control between Sun and United, althought this fact of itself is not sufficient to sustain the proposed price.

Turing to Superior's exceptions, Superior objects to paragraph (E) of the examiner's decision which invokes various subsections of Section 157.20 of the Commission' Regulations under the Natural Gas Act as to Superior contending that this Section applies to pipelines not producers. The examiner's decision should be modified to eliminate any requirement for compliance by Superior with subsection (c) of Section 157.20.

We conclude that the producer sales proposed herein are substantially supported by the evidence of record and should be certificated at the prices proposed, without the attachment of any price condition.

The Commision further finds:

All material exceptions, arguments and objections not discussed herein have been considered but are without substantial support in the record or a reasonable basis in law and should be denied. Except to the extent granted herein,

the parties' exceptions should be denied. The presiding examiner's initial decision issued herein on April 16, 1959, should, except to the extent modified by this order, be adopted by the Commission as of the date of issuance of this order, to constitute with this order its decision in these proceedings.

The Commission orders:

(A) The initial decision of the presiding examiner issued herein on April 16, 1959, is modified as hereinabove set forth, and as so modified is adopted by the Commission as of the date of issuance of this order, to constitute with this order its decision in these proceedings.

(B) The exceptions filed by the parties to the aforesaid initial decision are, except to the extent granted by this order, hereby denied.

By the Commission.

JOSEPH H. GUTRIDE
Joseph H. Gutride
Secretary

Order Denying Rehearing

(Issued October 7, 1959)

Petitions for rehearing of the Commission's order issued August 10, 1959, in the above-entitled proceedings were filed on September 8, 1959, by the Public Service Commission of the State of New York and on September 9, 1959, by The United Gas Improvement Company. By that order we issued a certificate of public convenience and necessity authorizing producer sales to United Gas Pipeline Company at the price proposed. Contending that this action was contrary to law and unsupported by fact, the petitioners request that we grant rehearing and issue to the producers certificates with price conditions; alternatively, it is contended, we can only deny the certificate applications.

The lack of merit to the argument made and matters asserted by petitioners is sufficiently evident from the discussion in the order of which rehearing is sought. There is only one matter we desire to discuss briefly. The United Gas Improvement Company contends that we erred in not considering the proposed producer price in the light of the "just and reasonable" standards of the Natural Gas Act, contending that the *Catco* case[1] imposes such a requirement by its language in 360 U.S. at p. 388, which states that "As the original Section 7(c) provided, it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest'."

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[1] *Atlantic Refining Company* v. *Public Service Commission of the State of New York*, 360 U.S. 378 (June 22, 1959).

However, in our view this language does not require that every producer certificate proceeding must necessarily assume the character of rate proceedings under Sections 4 or 5 of the Act, as we pointed out in our order. We recognize that cost evidence may be called for in a given

producer certificate proceeding, depending on the facts of the particular case;[2] but this does not mean that cost evidence is indispensible in every such case and in our judgment it is not indispensible in the instant case. We did consider the element of price in relation to the public demand and need for this gas and the maintenance of adequate service, as our order on its face discloses, and find that although we cannot determine the "just and reasonable" rate for this sale under the rate provisions of the Act, the certification of the price proposed is justified to assure the maintenance of adequate service in the public interest. We think as the Court held in *United Gas Improvement Co.* v. *F.P.C.*, Nos. 12798 and 12805 (CA 3, August 4, 1959), 269 F. 2d 865, with respect to proposed producer prices somewhat comparable to those involved herein, that the balancing of the weight properly to be accorded the various factors of public convenience and necessity requires certificating the producer sales proposed herein without any price condition.

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[2] The Supreme Court said at 360 U.S. 392-393, that "As the proposed contract price was higher than any paid by Tennessee, including offshore production in the West Delta area of Louisiana, it is surprising that evidence, if available, was not introduced as to the relative costs of production in the two submerged areas."

The Commission further finds:

The assignments of error and grounds for rehearing contained in the petitions for rehearing filed in these proceedings set forth no new facts or legal considerations which were not fully considered by the Commission when it issued its above-described order of August 10, 1959, or which having now been considered warrant any change or modification of said order.

The Commission orders:

The petitions for rehearing of the Commission's order issued August 10, 1959, filed herein on September 8, 1959, by the Public Service Commission of the State of New York and on September 9, 1959, by The United Gas Improvement Company are hereby denied.

By the Commission.

JOSEPH H. GUTRIDE
Secretary

APPENDIX C

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821; as amended by Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. 717-717w, are as follows:

Sec. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bonafide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if appplication for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be

prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise, such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

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Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in

whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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